United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1021

To be argued by
THOMAS P. SMITH

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1021

UNITED STATES OF AMERICA,

Appellee,

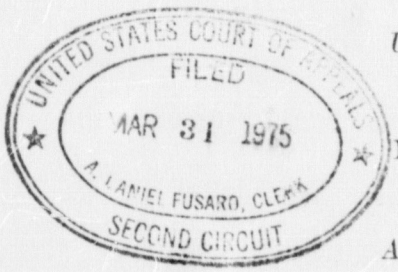
—v.—

MARTIN F. BURKE,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE



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Statement of the Case

By this appeal, Martin Burke seeks to overturn an October 29, 1974, ruling of the United States District Court for the District of Connecticut, which denied without written opinion a motion to suppress filed by the appellant on that same day.

On June 12, 1974, a Grand Jury sitting at Hartford returned a single count indictment, charging appellant with unlawful possession of an unregistered sawed-off shotgun, in violation of Title 26, United States Code, Sections 5861(d) and 5871.

A bench warrant for appellant's arrest was issued on June 24, 1974, upon his failure to appear for plea and arraignment. That warrant was executed on July 26, 1974, when Burke surrendered himself.

On September 23, 1974, appellant entered a plea of not guilty, having also failed to appear at the District Court's Criminal Calendar on September 9, 1974.

On October 29, 1974, the day before jury selection in the District Court, appellant requested, and obtained, from Government Counsel a copy of the affidavit in support of the search warrant under which appellant's shotgun was seized from his home. The appellant thereupon moved orally to suppress this evidence. This oral motion was later supplemented by a written motion by appellant's appointed counsel of the University of Connecticut Legal Clinic.

After careful examination of the affidavit and search warrant, and due consideration of appellant's oral argument, the Honorable T. Emmet Clarie, Chief Judge, denied the motion without written opinion.

Thereafter, appellant entered a plea of guilty to the indictment, reserving his right to appeal the District Court's ruling on the motion to suppress.

On December 23, 1974, defendant received a sentence of two years imprisonment, *execution of which was suspended*, and three years probation. It is this judgment which Martin Burke seeks to reverse.

Statutes Involved

Title 26, United States Code, Section 5861:

§ 5861. Prohibited acts

It shall be unlawful for any person——

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record;

Title 26, United States Code, Section 5845:

§ 5845. Definitions

For the purpose of this chapter—

(a) Firearm—The term "firearm" means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined in subsection (e); (6) a machinegun; (7) a muffler or a silencer for any firearm whether or not such firearm is included within this definition; and (8) a destructive device. The term "firearm" shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary or his delegate finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.

Rule 41, Federal Rules of Criminal Procedure:

(a) *Authority to Issue Warrant.* A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property is located, upon request of a federal law enforcement officer or an attorney for the government.

(b) *Property Which May Be Seized With a Warrant.* A warrant may be issued under this rule to search for and seize any (1) property that con-

stitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense.

(c) *Issuance and Contents.* A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

(d) *Execution and Return with Inventory.* The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The federal magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) *Motion for Return of Property.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

(f) *Motion to Suppress.* A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12.

(g) *Return of Papers to Clerk.* The federal magistrate before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

(h) *Scope and Definition.* This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects. The term "daytime" is used in this rule to mean the hours from 6:00 a.m. to 10:00 p.m. according to local time. The phrase "federal law enforcement officer" is used in this rule to mean any government agent, other than an attorney for the government as defined in Rule 54(c), who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant.

As amended Dec. 27, 1948, eff. Oct. 20, 1949; April 9, 1956, eff. July 8, 1956; April 24, 1972, eff. Oct. 1, 1972; March 18, 1974, eff. July 1, 1974.

Connecticut General Statute, Section 54-33:

(a) . . . 'property' includes, without limitation, . . . any . . . tangible thing.

(b) Upon complaint on oath . . . by any two credible persons, to any judge of . . . the circuit court, . . . that . . . they have probable cause to believe that any property

> (1) possessed . . . or intended for use or which is or has been used or which may be used as the means of committing any criminal offense; or
>
> (2) which was stolen or embezzled, is within or upon any place . . . such judge may issue a warrant commanding a proper officer to enter into . . . such place . . . search the same . . . and take into his custody all such property named in the warrant.

The Facts

On August 21, 1973, Agent Robert Hampp of the Bureau of Alcohol, Tobacco and Firearms, and Troopers David Bourbeau and Richard Raposa of the Connecticut State Police Department applied to the Honorable L. Robert Lacey, Judge of the Connecticut Circuit Court, for a warrant to search the Westland Street apartment of Martin Burke.

Assisted by officers of the Hartford Police Department, Hampp and Bourbeau executed the warrant on that same day. As they entered Burke's apartment, Bourbeau and Hampp heard a gunshot. Trooper Raposa, who was positioned in an alley outside the building, witnessed a man exiting Burke's apartment simultaneously with the gunshot. Once inside the apartment, Hampp and Bourbeau found Burke lying wounded on the floor in his bedroom with a 12 gauge sawed-off shotgun at his side. No one else was in the apartment.

After insuring that there were no other weapons in the immediate vicinity, or concealed on Burke's person, the officers administered first aid to defendant's accidentally, self-inflicted wound, then called an ambulance. As the Government represented in the District Court, a copy of the warrant and inventory of seized property was left

in a conspicuous place in Burke's apartment. And a return to the warrant was made to the Fourteenth Circuit Court in Hartford.

The shotgun, whose barrel was approximately 16 inches in length, was not registered to the appellant.

Questions Presented

1. Does an affidavit in support of a search warrant, which recites that a named, eyewitness has provided the affiants with a written statement, and has expressed a willingness to testify personally as to his first-hand observations of defendant's criminal activity, provide a neutral and detached magistrate with a sufficiently substantial basis for a finding that the eyewitness is worth of belief?

2. Does the technical non-compliance with Rule 41, F.R. Crim. P., of an otherwise valid state search warrant render the search invalid and require suppression of evidence seized thereunder?

ARGUMENT

I.

The present affidavit, which was based on Information given by a named eyewitness, who provided a written statement to the affiants, expressed a willingness to testify personally, and repeated admissions made by the defendant, provided a patently adequate basis upon which the magistrate could have found the eyewitness to be trustworthy.

Appellant's statement of the "primary issue raised in this appeal" assumes the very thing in question. The chief issue in this appeal is not whether an affidavit in support of a search warrant must contain some showing of an informant's trustworthiness. Rather, the issue is whether the affidavit in the present case, which identified by name the affiants' source of information; indicated that he was an eyewitness to the criminal activity that prompted the search; and expressed his willingness to testify personally as to his first-hand observations of that criminal activity, provided the issuing magistrate with a substantial basis for a finding that the source of the affiants' information was trustworthy and that probable cause existed for the search. The Government respectfully submits that it did.

The thrust of the Government's argument in the District Court was that the present affidavit, when compared with the affidavit upheld in *United States* v. *Sultan*, 463 F.2d 1066 (2d Cir. 1972), and when read with the common sense perspective mandated by *United States* v. *Ventresca*, 380 U.S. 102 (1965), was clearly sufficient. The Government abides by that argument and maintains that, if anything, the present affidavit provides an even *broader* basis for a finding of trustworthiness than was present in *Sultan*.

In *Sultan*, an agent of the Federal Bureau of Investigation applied for a warrant to search the defendant's home for fraudulently concealed assets. The affidavit in support of that warrant read as follows:

> "The source of your deponent's information and the grounds for his belief are as follows:
>
> 1. An involuntary petition of bankruptcy was filed on or about April 15, 1970 . . . by . . . creditors of the said bankrupt Sultan's Big Discount, Inc.
>
> 2. Investigation by your deponent which revealed that Samuel Sultan . . . was and still is principal officer of the bankrupt. . . .
>
> 3. Information given to your deponent by one Charles Sultan, cousin of Samuel Sultan on or about January 5, 1971 that the merchandise and assets of the bankrupt Sultan's Big Discount, Inc. were being concealed from the Trustee in Bankruptcy in the house at 1557 East 21st St., Brooklyn, N.Y., and additionally, in a detached garage on said premises." 463 F.2d at 1068.

The Court found that the affidavit satisfied the first prong of the two-prong test of *Aguilar* v. *Texas*, 378 U.S. 108 (1964), in that it recited that the informant had acquired his information through defendant's own admissions to him. As to the requirement that the affidavit contain some showing of the informant's trustworthiness, the Court held that

> "The principle in all these cases . . . is that the magistrate must have a substantial basis for crediting the hearsay. United States v. Harris, supra, 403 U.S. at 581, 91 S.Ct. at 2080 (plurality opinion). See also Jones v. United States, supra, 362 U.S. at 269, 271, 80 S.Ct. 725; United States v. Bozza, supra, 365 F.2d at 225. This principle, and the cases cited

> above, lead to the conclusion that the affidavit offered to the magistrate in this case was sufficient for him to conclude that Charles Sultan was reliable. *He was named in the affidavit, was related to the defendant, and was reporting an admission of criminal activity by the defendant.*" *Id.* at 1069 (emphasis added).

After setting forth the law enforcement experience of Agent Hampp and Troopers Bourbeau and Raposa, the affidavit in the present case reads, in pertinent part, as follows:

> "[4.] That, on 8-21-73, at 0755 hrs., Lonnie C. Thompson, of 104 Kensington St., Htfd., Conn., was interviewed and submitted a written statement and will testify to the fact that on 8-20-73, at 1645 hrs., he was in Apt. #3, on 279 Westland St., Htfd., Conn., resided in by Martin Burke, and had seen a sawed-off shotgun in the apartment's bedroom.
>
> [5.] That, Thompson further states, that he has been told by Burke that the gun was stolen in a burglary.
> [6.] That, as a result of the receipt of the information a check was conducted to search the National Firearms Registration and Transfer Record. . . Special Agent Hampp was informed that no record could be found of any firearm registered to Martin Burke, of 279 Westland St. . . ."

Like the affidavit approved in *Sultan*, the present affidavit specifically identifies by name the affiants' source of information. Although appellant minimizes this fact, the Government respectfully submits that it is significant. This fact, standing alone, distinguishes the present case from the factual situations present in *Aguilar* v. *Texas*, *supra*, and *Spinelli* v. *United States*, 393 U.S. 410 (1969), and *in itself* forms a "substantial basis" from which the issuing magistrate could have concluded that the affiants' source was trustworthy.

Contrary to appellant's contention in the District Court, both *Aguilar* and *Spinelli* dealt with information acquired in unknown ways by *unidentified informants*. Moreover, analysis of the cases relied upon in the *Aguilar* and *Spinelli* opinions indicates that of the seven decisions cited in *Aguilar*,[1] and the nineteen cases cited in the *Spinelli* opinion, concurrence, and dissents,[2] not a single one involved an affidavit which identified by name the affiant's source of information. Hence, the Government respectfully submits that neither case is authority for the proposition that the naming of an affiant's source of information is an *inadequate* basis for a finding of trustworthiness.

However, the naming of the respective affiants' sources of information is not the only similarity between the present case and *Sultan*. Like the affidavit approved in *Sultan*, the present affidavit also recites certain admissions made by the defendant to Lonnie Thompson. Those admissions go to the core of the criminal activity that prompted the search. Analysis of this Court's opinion in *Sultan* indicates that the manner in which an "informant" has acquired his information is relevant not simply to the first prong of the *Aguilar-Spinelli* test, but also to the issue

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[1] See *Rugendorf* v. *United States*, 376 U.S. 528 (1964); *Ker* v. *California*, 374 U.S. 23 (1963); *Jones* v. *United States*, 362 U.S. 257 (1960); *Giordenello* v. *United States*, 357 U.S. 480 (1958); *Johnson* v. *United States*, 333 U.S. 10 (1948); *Nathanson* v. *United States*, 290 U.S. 41 (1933); and *United States* v. *Lefkowitz*, 285 U.S. 452 (1932), all of which involved either unnamed informants or no informants.

[2] In addition to those cases cited in *Aguilar*, see *McCray* v. *Illinois*, 386 U.S. 300 (1967); *Jaben* v. *United States*, 381 U.S. 214 (1965); *United States* v. *Ventresca*, 380 U.S. 102 (1965); *Beck* v. *Ohio*, 379 U.S. 89 (1964); *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Draper* v. *United States*, 358 U.S. 307 (1958); *Wolf* v. *Colorado*, 338 U.S. 383 (1949); *Trupiano* v. *United States*, 334 U.S. 699 (1948); *Grau* v. *United States*, 287 U.S. 124 (1932); *Husty* v. *United States* 282 U.S. 694 (1931); *Byars* v. *United States*, 273 U.S. 28 (1927); and *Weeks* v. *United States*, 232 U.S. 383 (1914).

of trustworthiness. This principle, implicit in the Government's argument in the District Court and undoubtedly weighed by the issuing magistrate, has been recognized in other Circuits as well.

> "There is nothing in *Aguilar* v. *Texas, supra*, which gives any support to the contention that these two propositions [i.e. the two prongs of *Aguilar*] are wholly independent of one another. We are constrained to hold they are not and that one may furnish support to the other. . ." *United States* v. *Crawford*, 462 F.2d 597 (9th Cir. 1972).

Apart from the foregoing things, there are several additional factors which make the present affidavit *stronger* than the one upheld in *Sultan*. Nothing in *Sultan* indicates that the informant in that case had made anything more than a casual remark to FBI Agent Hand, the affiant. By contrast, here the affiants' source of information provided a *written statement* and expressed his willingness *to testify* personally as to his first-hand observations. A person's willingness to formalize into a written statement his first-hand experiences, and to appear personally to testify as to what he has seen, is clearly entitled to weight in the process by which his trustworthiness is evaluated. "There is no war between the Constitution and common sense . . .," *Mapp* v. *Ohio*, 367 U.S. 643, 657 (1961), and frequently resort to the latter satisfies the requirements of the former.

Failure to give proper recognition to the significance of Thompson's written statement and willingness to testify would hardly be in keeping with the spirit of *United States* v. *Ventresca*, 380 U.S. 102 (1965), wherein the Court observed:

> "If the teachings of the Court's cases are to be followed and the constitutional policy served, affi-

> davits for search warrants, such as the one involved here, must be tested and interpreted by the magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts towards warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." *Id.* at 108.

An additional factor properly to be considered by an issuing magistrate in evaluating trustworthiness is the possible danger, not to mention potential civil consequences, to which a named source such as Thompson automatically subjects himself. *Cf. United States* v. *Wong*, 470 F.2d 129 (9th Cir. 1972).

Appellant's contention that the present case is distinguishable from *Sultan* in that here Lonnie Thompson was not related to the defendant is nonsense. The point of *Sultan* was not that consanguinity is essential to a finding of trustworthiness. The point of *Sultan* was that:

> "*Information from named and unnamed informants has been held sufficient by virtue of the status of the informants or their relationship to the crime* or to the defendant. United States ex rel. Cardaio 1. Casscles, 446 F.2d 632, 637 (2d Cir. 1971." *United States* v. *Sultan, supra,* 463 F.2d at 1069 (emphasis added).

Although Lonnie Thompson was not a cousin to the appellant, Thompson most certainly did enjoy a special status. Lonnie Thompson was an *eyewitness* to a crime. *See* Title 26, United States Code, Section 5861(d) and Title 18, United States Code App. 1202(a)(1).

Thompson is nowhere described in the instant affidavit as an "informant." He is identified by name and described only as an eyewitness to the commission of a crime. In *Ignacio* v. *People of Guam*, 413 F.2d 513 (9th Cir. 1969), *cert. den.*, 397 U.S. 943 (1970), a case cited approvingly in *Sultan*, the Court rejected a claim identical to appellant's by focusing on the status of eyewitnesses:

> "Mrs. Downey was not an unknown informant as in Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed. 2d 637. The facts stated in her affidavit were known personally to her. *She witnessed the brothers carrying stolen property into their residence. She heard gunshots coming from the house. Reliance could properly be placed on the affidavit in issuance of the search warrant.*
>
> * * * * Francisco Ignacio was a convicted felon. It would have been a crime for him to possess firearms." *Ignacio* v. *People of Guam, supra*, 413 F.2d at 519 (emphasis added).

Like the defendant in *Cundiff* v. *United States*, 501 F.2d 188 (8th Cir. 1974) (*per curiam*), the appellant Burke

> "fails to note the important distinction between an informant who divulges evidence of a crime obtained from sources unknown to the affiant or magistrate and an individual who is an 'eyewitness' and only relates matters gathered from his own observation. As we stated in McCreary v. Sigler, 406 F.2d 1264, 1269 (8th Cir.), cert. denied, 395 U.S. 984, 89 S.Ct. 2149, 23 L.Ed. 2d 773 (1969):
>
> > The essence of reliability may be found in an informant's statement of facts rather than an allegation of more conclusory suspicion. An informant who alleges he is an 'eyewitness' to

> an actual crime perpetrated demonstrates sufficient reliability of the person." *Cundiff* v. *United States, supra,* 501 F.2d at 190.

Thompson's status as an eyewitness, totally apart from the fact that he was named in the affidavit and expressed a willingness to testify, was sufficient to establish his trustworthiness. This principle is recognized in *United States* v. *Bell,* 457 F.2d 1231 (5th Cir. 1972):

> "It is now a well-settled and familiar concept, as enunciated by *Aguilar* and *Spinelli,* that supporting affidavits in an application for a search warrant must attest to the credibility of an informant and the reliability of his information. *See also* United States v. Harris, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed. 2d 723 (1971). *We have discovered no case that extends this requirement to the identified bystander or victim-eyewitness to a crime, and we now hold that no such requirement need be met.*" 457 F.2d at 1239 (emphasis added).

In accord see, *United States* v. *McCoy,* 478 F.2d 176, 178-179 (10th Cir.), *cert. denied,* 414 U.S. 828 (1973); *United States* v. *Rajewich,* 470 F.2d 666, 668 (8th Cir. 1972); *United States* v. *Mahler,* 442 F.2d 1172, 1174 (9th Cir. 1971); *Ignacio* v. *People of Guam,* 413 F.2d 513, 519 (9th Cir. 1969), *cert. denied,* 397 U.S. 943 (1970); *United States* v. *Brody,* 357 F. Supp. 910, 912-913 (W.D. Mo. 1973); *Coyne* v. *Watson,* 282 F. Supp. 235, 237 (S.D. Ohio 1967), *aff'd,* 392 F.2d 585 (6th Cir. 1968). *Cf. United States* v. *Sultan, supra,* 463 F.2d at 1069. *Also* see, *United States* v. *Miley,* — F.2d — (2d Cir. 1975), *slip op.* at 2283-2284 (March 19, 1975).

Although each, and every, of the foregoing arguments and authorities command affirmance of the District Court's ruling on appellant's eleventh-hour motion to suppress, the

Government is obliged to address itself to the remainder of appellant's contentions.

Contrary to appellant's suggestion, the search which Agent Hampp caused to be made of National Firearms Registration and Transfer Records most certainly did constitute an independent investigation of Lonnie Thompson's credibility. Thompson not only stated that he saw a sawed-off shotgun in appellant's bedroom, he also reported that appellant had admitted that the gun was stolen in a burglary. While a negative check of those records would not necessarily show that appellant truly did possess the firearm, a positive result (i.e. a finding that a sawed-off shotgun *was* registered to appellant) most clearly would have tended to discredit Thompson's claim that appellant had admitted the gun was stolen. The check of the National Firearms Registration and Transfer Records may therefore be viewed both as an attempt to establish an element necessary for conviction under 26 U.S.C. § 5861(d), and as an attempt to discover palpable *unreliability* on the part of Thompson. To the extent the test failed to establish unreliability, it aided in establishing the converse.

The fact that a negative result of such a search may in itself sometimes be consistent with innocence in no way prevents that result from being considered by a magistrate in determining whether probable cause exists:

> "[P]robable cause 'is a practical, nontechnical conception.' *Brinegar* v. *United States*, *supra*, 338 U.S. at 176, 69 S.Ct. at 1311—no particular element must always be present; the presence of no one element is invariably conclusive. *The presence or absence of probable cause is to be determined 'in the light * * * all the circumstances,' ibid.—it is immaterial that each circumstance, taken by itself, may be consistent with innocence.* See *United States* v.

> *Bianco,* 189 F.2d 716, 720 (3d Cir. 1951)." *Hernandez* v. *United States,* (9th Cir. 1966) 353 F.ed 624, 628. (Emphasis added).

Judge Lacey, like the magistrate in *Jones* v. *United States,* 362 U.S. 257 (1960), was entitled to assume the *probable* existence of a sawed-off shotgun from the fact that a named-eyewitness, who both repeated defendant's admissions and expressed a willingness to testify, claimed to have seen it in appellant's apartment. Judge Lacey's satisfaction that such a gun was *probably* present in Burke's apartment was all that was required:

> "It has often been repeated, but bears repetition that 'in dealing with probable cause, * * * as the very name implies, we deal with *probabilities.* These are not technical; they are the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act.' *Bringar* v. *United States, supra,* 338 U.S. at 175, 69 S.Ct. at 1310, 93 L.Ed. 1879. (Emphasis added)." *Smith* v. *United States,* 358 F.2d 833, 837 (D.C. Cir. 1966).

Finally, with respect to the cases relied upon by appellant, the Government respectfully submits that, simply stated, they do not apply.

United States, ex rel. Saiken v. *Benzinger,* 489 F.2d 865 (7th Cir. 1973), merely stands for the proposition that a magistrate cannot infer that an unnamed, non-eyewitness obtained his information in a reliable way. This is a truism. Even a casual reading of *Benzinger* indicates that the affidavit in question failed the *first* prong of the *Aguilar* test, *which prong appellant concedes the present affidavit satisfies* (see appellant's brief at 7, n. 1). Similarly, *United States* v. *McSurely,* 473 F.2d 1178 (D.C. Cir. 1972) is inapposite. Although the informant in that case was

named, the affidavit simply recited that he "believed" defendant's home contained *"certain seditious materials."* Id. at 1185. The Court noted that there was nothing in the affidavit which showed *why* or *how* the informant knew the material was *"seditious."* Likewise, in *Flanagan* v. *Rose*, 478 F.2d 222 (6th Cir. 1972), the Court invalidated the warrant not because the affidavit failed the second prong of *Aguilar*, but because the affidavit failed to set forth *any* circumstances showing how the *non-eyewitness* informant obtained his information. In sum, this affidavit also failed the *first* prong of the *Aguilar* test.

In *United States* v. *Dzialak*, 441 F.2d 212 (2d Cir. 1971), the informant was neither an eyewitness, nor identified by name. In *United States* v. *Viggiano*, 433 F.2d 716 (2d Cir. 1970), *cert. denied*, 401 U.S. 938 (1971), the informant's *status* as an eye-witness was sufficient to meet the second prong of *Aguilar*. *United States* v. *Bozza*, 365 F.2d 206 (2d Cir. 1966), if anything calls for affirmance of the District Court's ruling by emphasizing an informant's trustworthiness can be established in collateral ways. And, finally, *United States* v. *Canestri*, 376 F. Supp. 1149 (D. Conn. 1974), in which the District Court upheld a warrant issued on the basis of information supplied by an unnamed, eye-witness, further supports the Government's position.

In the present case, both the issuing magistrate, himself a judge of a state court-of-record, and the United States District Court, reviewed the instant affidavit and found that it provided probable cause for the issuance of the warrant. These independent determinations of probable cause are entitled to great weight by a reviewing Court. See, e.g., *United States* v. *Freeman*, 358 F.2d 459, 462 (2d Cir.), *cert. denied*, 385 U.S. 882 (1966); *United States* v. *Koonce*, 485 F.2d 374, 380 (8th Cir. 1973); *Bastida* v. *Henderson*, 487 F.2d 860, 863 (5th Cir. 1973); *United States* v. *Epstein*, 240 F. Supp. 84, 85 (S.D.N.Y. 1965); *Conti* v. *Morganthau*, 232 F. Supp. 1004,

1006 (S.D.N.Y. 1964); *Guzewicz* v. *Slayton*, 366 F. Supp. 1402, 1406 (E.D. Va. 1973).

For all of the foregoing reasons, the Government respectfully submits that the District Court properly denied appellant's motion to suppress. Its judgment should be affirmed.

II.

The procedure employed in the issuance of this warrant violated neither appellant's constitutional rights nor any substantial policy or Rule 41, of the Federal Rules of Criminal Procedure.

A. Appellant Lacks Standing to Challenge the procedural direction of the instant warrant.

In rejecting a claim similar to that made by appellant in the present case, the Court in *United States* v. *Harrington*, 504 F.2d 130 (7th Cir. 1974) raised the issue of standing to challenge the procedural compliance of a warrant with Rule 41, F.R. Crim. P. Although the Court found under the particular facts of that case that there had been compliance with Rule 41, it assumed, without deciding, the issue of standing by adding, "should defendant have standing to raise this question." Id. at 134, n.2. However, by citing with approval *United States* v. *Gannon*, 201 F. Supp. 68, 73 (D. Mass. 1961), the Court indicated *sub silentio* what position it would have taken on the question, had the issue been unavoidable.

In *United States* v. *Gannon, supra*, the Court found that the defendant lacked standing to challenge a warrant on the basis of the civil officer to whom it was directed. In so doing, it examined the reasoning behind Rule 41(c):

> "The sole reason why the 'messenger' is often named in the search warrant and the sole reason why Rule

> 41(c) of the Rules of Criminal Procedure provides that 'the warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States,' is the same reason that the proposed arresting officer is named in a warrant of arrest. When a Commissioner's warrant names a particular officer to undertake the duty of making a search or an arrest, the Court can validly punish him if he does not execute his duty as he is bound to do. See 4 Blackstone, Commentaries, *288. In view of the use in Rule 41(c) of the auxiliary verb 'shall', the Rule directs the Commissioner to state the official who is to act under penalty of punishment. But the Commissioner's *failure to follow this directory provision is not of consequence to any private person, whose interest could not be adversely affected.* So far as the private person is concerned, all that the Commissioner *must* do is to state why the property is being seized, what it is, and where it is." 201 F. Supp. at 73.

The fact that appellant in the present case does not couch his argument in constitutional terms indicates that he, like the defendants in *Harrington* and *Gannon,* seeks suppression solely on the grounds of technical non-compliance with the provisions of Rule 41.

Gannon is also approvingly cited in *United States* v. *Soriano,* 482 F.2d 469 (5th Cir. 1973). In *Soriano* the Court delineated the interests sought to be served through the direction requirement of Rule 41. They are: to fix responsibility in the event the warrant is *not* executed; to enable the magistrate to make the determination that an appropriate officer will serve the warrant; to ensure that the premises are searched by an appropriate officer; and

to provide a record that the search was properly conducted by such an officer. While *Soriano* indicates that these interests are important, *Soriano's* reliance on *Gannon* demonstrates that the *Soriano* Court did not view them as being of such a personal nature as to confer standing on a defendant who has not, and cannot, show prejudice.

Although the Government does not concede that the instant warrant was executed by improper officers, the Court in *Gannon* clearly indicated the interest of insuring that a warrant is executed by a proper official does not confer standing.

> "Furthermore, it may be noted that if the person whose property is seized wishes, he can always demand from the person executing the search warrant proof that that person is, as he claims, an official, and hence authorized to serve." *Id.* at 74.

In sum, the defendant lacks standing to assert the claim he now makes.

B. Failure to conform to the precise ministerial terms of Rule 41, F.R. Crim. P., does not require suppression of the products of a search warrant validly issued and executed.

In *United States* v. *Sellers*, 483 F.2d 37 (5th Cir. 1973), *cert. denied*, — U.S. —, 94 S. Ct. 2604 (1974), the Court made the following observation:

> "A federal court reviewing the sufficiency of a warrant issued by a state court, for the purpose of determining whether the fruits of a resulting search are lawful and hence admissible in a federal prosecution, must determine whether the warrant was issued as a federal warrant or as a state warrant. If the warrant was issued under authority of Rule 41 as a federal warrant clearly it must comply with

> the requirements of the rule. If, however, the warrant was issued under authority of state law then every requirement of Rule 41 is not a *sine qua non* to federal court use of the fruits of a search predicated on the warrant, even though federal officials participated in its procuration or execution. The products of a search conducted under the authority of a validly issued state warrant are lawfully obtained for federal prosecutorial purposes if that warrant satisfies constitutional requirements and does not contravene any Rule-embodied policy designed to protect the integrity of the federal courts or to govern the conduct of federal officers." *Id.* at 43.

Appellant's contention that a state warrant could not have been obtained to search for, and seize, the shotgun in the present case is incorrect.

Connecticut General Statutes, section 54-33a, governs the issuance of state search warrants and provides, in pertinent part, as follows:

> "(a) . . . 'property' includes, without limitation, . . . any . . . tangible thing.
>
> (b) Upon complaint on oath . . . by any two credible persons, to any judge of . . . the circuit court, . . . that . . . they have probable cause to believe that any property
>
> (1) possessed . . . or intended for use or which is or has been used or which may be used as the means of committing any criminal offense; or
>
> (2) which was stolen or embezzled, is within or upon any place . . . such judge may issue a warrant commanding a proper officer to enter

> into . . . such place . . . search the same . . . and take into his custody all such property named in the warrant."

The affidavit in the instant case indicates that the appellant admitted to Lonnie Thompson that the sawed-off shotgun was stolen. It, therefore, was clearly subject to seizure under Conn. Gen. Stat. § 54-33a(b)(2). Moreover, a sawed-off shotgun is contraband, which by definition is subject to seizure by any law enforcement officer even without a warrant. *See*, e.g., *Harris* v. *United States*, 331 U.S. 145, 155 (1947); *Anglin* v. *Director, Pauxtent Institution*, 439 F.2d 1342, 1347-1348 (4th Cir. 1971); *United States* v. *Berry*, 423 F.2d 142, 144 (10th Cir. 1970); *Gurleski* v. *United States*, 495 F.2d 253, 258 (5th Cir. 1968); *United States* v. *Teller*, 397 F.2d 494 (7th Cir. 1968); *United States* v. *Seymour*, 369 F.2d 825, 827 (10th Cir. 1966); *Porter* v. *United States*, 335 F.2d 602, 607 (9th Cir. 1964); *United States* v. *Daniel T. Shea*, Crim. No. H-316 (D. Conn. October 18, 1972), *aff'd in open court* (2d Cir. April 12, 1973); *State* v. *Johnson*, 162 Conn. 215, 221-223 (1972). Beyond this, the non-utilitarian value of a sawed-off shotgun makes it inherently likely that it "may be used as the means of committing [a] criminal offense," within the meaning of Conn. Gen. Stat. § 54-33a(b)(1). It was therefore subject to seizure pursuant to this provision as well.

Here two state police officers and one federal agent cooperated in securing and executing a search warrant from a judge of a state court-of-record. The object to be searched for and seized affected the interests of the State of Connecticut as much as it affected those of the Federal Government. The fact that the affidavit cited Title 26, United States Code, Section 5861(d), rather than Conn. Gen. Stat. § 54-33a(b)(1) or (b)(2), does not command that it be characterized as a federal rather than a state warrant. If the miscitation of statutes in indict-

ments, which are drawn by lawyers, is not a ground for their invalidation, see *United States* v. *Rivera,* — F.2d — (2d Cir. 1975), slip op. March 15, 1975, then the common sense approach suggested in *United States* v. *Ventresca, supra,* would suggest that a law-enforcement officer's selection of a statute, chosen in the haste of a criminal investigation, should not form the basis for an iron-clad characterization of the warrant as either state or federal. The Government submits that the instant warrant may just as easily, and should be, viewed as a state warrant.

Even if the warrant were to be characterized as a federal one, however, no reason exists for its invalidation. *Navarro* v. *United States,* 400 F.2d 315 (5th Cir. 1968), although cited by the appellant, is clearly not authority for his claim. In *Navarro* the warrant was invalidated because it was signed by a judge of the San Antonio Corporation Court, which was *not* a court-of-record under Texas law. *Id.* at 316.

The Circuit Court of the State of Connecticut, by contrast, most certainly is a "court of record." Whether a particular state court is a court of record within the meaning of Rule 41(a), F.R. Crim. P., "must be determined by reference to state law and not by attempted federal interpretation of the language of Rule 41(a)." *United States* v. *Hanson,* 469 F.2d 1375, 1377 (5th Cir. 1972), *reh. denied* (1973). Also see *United States* v. *Perez,* 375 F. Supp. 332, 333 (W.D. Texas 1974); *United States* v. *Pechac,* 54 F.R.D. 187, 189 (D. Arizona 1972). Connecticut General Statutes, Section 51-248, reads in pertinent part, "The Circuit Court shall have a proper seal *and be a court of record.*" (Emphasis added). Hence the instant warrant fully complies with Rule 41(a).

Thus, appellant is left with three contentions: (1) that the warrant is invalid because it is "directed to state and

local, rather than federal officers;" (2) that the warrant is invalid because it does not designate a federal magistrate to whom it shall be returned; and (3) that the warrant is invalid because it does not command execution within ten days, "but merely requires execution within a reasonable time."

In *United States* v. *Passero*, 385 F. Supp. 654 (D. Mass. 1974), the Court interpreted the *Sellers-Harrington* test as being whether "the warrant satisfies constitutional requirements and does not contravene any substantial policy in Rule 41 designated to protect the integrity of federal courts or to govern the conduct of federal officers." *United States* v. *Passero, supra,* 385 F. Supp. at 658.

Appellant does not contend that his constitutional rights have been violated, nor has he made any showing of prejudice. Moreover, there has been absolutely no contravention of any substantial policy of Rule 41, much less a policy designed to "protect the integrity of federal courts or to govern the conduct of federal officers." There has not even been a contravention of an insubstantial policy of Rule 41.

Although the Government does not concede appellant has standing to raise the issue, the instant warrant is directed to, in addition to the State Police, "any Police Officer of a regularly-organized police department." Surely, Agent Hampp of the Bureau of Alcohol, Tobacco and Firearms fits within that definition. Neither the phrase "police officer" nor "police department" can, or should, be read to exclude federal peace officers.

The fact that the warrant does not designate a federal magistrate to whom the warrant must be returned clearly contravenes no substantial federal policy. In *United States* v. *Wilson,* 451 F.2d 209, 214 (5th Cir. 1971), the Court

held that the failure to make a return on a warrant does not invalidate it. *Also* see, *United States* v. *Haskins,* 345 F.2d 111 (6th Cir. 1965); *Reisgo* v. *United States,* 285 F. 740 (5th Cir. 1923); and *United States* v. *Klapholz,* 17 F.R.D. 18 (S.D.N.Y. 1955), *aff'd,* 230 F.2d 494 (2d Cir.), *cert. denied,* 351 U.S. 924 (1956). Designation of a federal magistrate to whom the return should be made should, as a matter of logic, be no more critical to the validity of the underlying search than is the actual act of making the return. *Cf. United States* v. *Kennedy,* 457 F.2d 63, 67 (10th Cir. 1972); *United States* v. *Averell,* 296 F. Supp. 1004, 1014 (E.D.N.Y. 1969); *Howard* v. *United States,* 306 F.2d 392 (10th Cir. 1962).

Moreover, the Government most respectfully submits that a return to the instant warrant was in fact made by Trooper Bourbeau to the Fourteenth Circuit Court on the very next day. And, the Government so represented during oral argument in the District Court.

No prejudice has been demonstrated from the instant warrant's failure to direct that it be executed within ten days. Actually, the warrant was executed on the same day it was obtained.

The cases relied upon by appellant merit brief mention. Appellant cites *United States* v. *Smith,* 16 F.2d 788 (S.D. Fla. 1927), for the proposition that the "direction" of a search warrant is critical to the warrant's validity. This is misleading. *Smith* was based on The Espionage Act of 1917. This Act sets standards totally different from those set by Rule 41, F.R. Crim. P. As *United States* v. *Soriano, supra,* indicates, *Smith* is inapplicable to cases involving Rule 41(c), since the category of persons authorized to execute warrants has been broadened rather significantly in the last half-century. Other Espionage Act cases cited by appellant include *United States* v. *Musgrave,* 293 F. 203

(D. Neb. 1923); *United States* v. *Kohlman*, 51 F.2d 313 (M.D. Penn. 1931); *United States* v. *Leach*, 24 F.2d 965 (D. Del. 1928); and *Steele* v. *United States*, 267 U.S. 505 (1925). They are equally inapposite.

In denying appellant's motion to suppress, the District Court was not only not in error, it was clearly correct.

CONCLUSION

The Government respectfully submits that the District Court properly denied appellant's motion to suppress and that its judgment should be affirmed.

Respectfully submitted,

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United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 75-1021

UNITED STATES OF AMERICA

Appellee

v.

MARTIN F. BURKE

Appellant

AFFIDAVIT OF SERVICE BY MAIL

ld Candelaria, being duly sworn, deposes and says, that deponent a party to the action, is over 18 years of age and resides at 227 St. Ann's Ave nx, New York

That on the 31st day of March, 1975, deponent the within Brief for the Appellee

David S. Golub, Esq. 1800 Asylum Ave, West Hartford, Conn. 06117

ney(s) for the Appellant in the action, the address designated by said attorney(s) for the se by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post official depository under the exclusive care and custody of the United States Post Office department the State of New York.

David Candelaria

to before me,

31st day of March 1975

Edward A Quimby

EDWARD A. QUIMBY
Notary Public, State of New York
No. 24-3183500
Qualified in Kings County
Commission Expires March 30, 1977